2006

State of Utah Plaintiff/Appellee v. Uriel Chavez-Espinoza Defendant/Appellant: Brief of Appellee

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, v.	:	Case No. 20061090-CA
URIEL CHAVEZ-ESPINOZA, Defendant/Appellant.	:	

BRIEF OF APPELLEE

APPEAL FROM CONVICTIONS ON ONE COUNT OF AGGRAVATED BURGLARY, A FIRST DEGREE FELONY; ONE COUNT OF AGGRAVATED ASSAULT, A SECOND DEGREE FELONY; AND THREE COUNTS OF SIMPLE ASSAULT, A CLASS A MISDEMEANOR, IN THE FOURTH JUDICIAL DISTRICT, WASATCH COUNTY, THE HONORABLE DEREK P. PULLAN PRESIDING

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BRIEF OF APPELLEE

JURISDICTION AND NATURE OF THE PROCEEDINGS

Defendant appeals from convictions of one count of aggravated burglary, a first degree felony; one count of aggravated assault, a second degree felony; and three counts of simple assault, a class A misdemeanor, in the Fourth Judicial District, Wasatch County, the Honorable Derek P. Pullan presiding. This Court has jurisdiction over the appeal under Utah Code Ann. § 78-2a-3(2)(j) (West 2004).

ISSUES ON APPEAL AND STANDARDS OF REVIEW

1. Was the guilty verdict on aggravated burglary inconsistent with another verdict, and, if so, does the inconsistency require a reversal?

Standard of review. Where a defendant argues that a verdict of guilty on one count is inconsistent with a verdict of not guilty on another count, the question on review is simply whether the evidence suffices to support the guilty verdict. *State v. Stewart*, 729 P.2d 610, 613 (Utah 1986).

2. Can defendant establish that the trial court plainly erred in giving a jury instruction where he affirmatively represented to the trial court that he had no objection to it? Was trial counsel ineffective for not objecting to the instruction below?

Standard of review. No standard of review applies to the first question. "An ineffective assistance of counsel claim raised for the first time on appeal presents a question of law." *State v. Clark*, 2004 UT 25, ¶ 6, 89 P.3d 162.

3. Where defendant, without reason, failed to maintain contact with his trial counsel, was counsel ineffective for not more fully consulting with defendant in his preparations for trial?

Standard of review. See standard for issue 2, above.

4. Did the trial court properly deny defendant's motion to dismiss at the close of the State's case?

Standard of review. The grant or denial "of a motion to dismiss is a question of law [that] [an appellate court] review[s] for correctness, giving no deference to the decision of the trial court." *State v. Hamilton*, 2003 UT 22, ¶ 17, 70 P.3d 111 (internal quotation marks and citations omitted).

5. Did the evidence regarding the aggravated burglary count suffice to support the jury's guilty verdict?

Standard of review. When reviewing a jury verdict, an appellate court "review[s] the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the verdict of the jury." *State v. Shumway*, 2002 UT 124, ¶ 15, 63 P.3d 94. The court "will reverse a jury conviction for insufficient evidence only when the

evidence is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted." *Id.* (citation omitted).

6. Where a defendant does not demonstrate that a biased juror sat, can he prevail on his claims that the trial court abused its discretion in granting or denying a motion to strike a juror for cause?

Standard of review. "Whether to dismiss a prospective juror for cause is within the sound discretion of the trial court. When reviewing such a ruling, [the appellate court] reverse[s] only if the trial court has abused its discretion." *State v. Finlayson*, 956 P.2d 283, 290 (Utah App. 1998) (quoting *State v. Baker*, 884 P.2d 1280, 1281 (Utah App. 1994)) (internal quotation marks and additional citations omitted). "If a defendant believes the trial court erred in failing to dismiss a juror for cause, in order to preserve the error on appeal, a criminal defendant must exercise a peremptory challenge, if one is available, against the juror unsuccessfully challenged for cause." *Id.* (quoting *State v. Baker*, 935 P.2d 503, 510 (Utah 1997)). Moreover, "[e]ven if the trial court has erroneously granted or denied a challenge for cause, . . . to prevail on a claim of error . . . a defendant must demonstrate prejudice, viz., show that a member of the jury was partial or incompetent." *Id.* (quoting *State v. Menzies*, 889 P.2d 393, 398, 400 (Utah 1994)) (internal quotation marks omitted).

7. Defendant claims that the trial court violated his Sixth Amendment right to a jury drawn from a fair cross-section of the community. Is this claim timely?

Standard of review. The timeliness of a challenge to the composition of a jury—whether to the venire or to the selected jury—is a question of law, reviewed for correctness. *State v. Valdez*, 2006 UT 39, ¶¶ 11, 35, 140 P.3d 1219.

8. Should the trial court have sua sponte granted a mistrial when, upon questioning by defense counsel, a witness stated that he was afraid because defendant had threatened his family members?

Standard of review. To establish plain error, defendant must show (1) that an error occurred; (2) that the error should have been obvious to the trial court; and (3) that the error was prejudicial. *See State v. Casey*, 2003 UT 55, ¶ 41, 82 P.3d 1106.

9. Where defendant affirmatively approved the jury instructions, may he now argue that the trial court plainly erred for not instructing on a lesser included offense of trespassing?

Standard of review. No standard of review applies to this claim.

10. Should this Court grant defendant's request that it reconsider its earlier denial of his rule 23B motion for remand, where defendant provides no legal or factual support for his request?

Standard of review. No standard of review applies to this claim.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following relevant statutes are reproduced in **Addendum A**:

Utah Code Ann. § 76-2-202 (West 2004);
Utah Code Ann. § 76-3-203.1 (West 2004);
Utah Code Ann. § 76-3-203.1 (West Supp. 2006);
Utah Code Ann. § 76-6-203 (West 2004).

STATEMENT OF THE CASE

The State charged defendant with one count of aggravated burglary, a first degree felony, in violation of Utah Code Ann. § 76-6-203 (West 2004); one count of child abuse, a first degree felony, in violation of Utah Code Ann. § 76-5-109 (West Supp. 2005); one count of aggravated assault, a second degree felony, in violation of Utah Code Ann. § 76-5-103 (West 2004); and four counts of assault, a class A misdemeanor, in violation of Utah Code Ann. § 76-5-102 (West 2004). R15-17. In addition, the State charged him on all counts with criminal responsibility for the conduct of another, subjecting him to criminal liability under Utah Code Ann. § 76-2-202 (West 2004). *Id.* The State also charged defendant with committing all the offenses in concert with two or more persons, subjecting him to enhanced penalties for group criminal activity under the Utah Code Ann. § 76-3-203.1 (West Supp. 2006), commonly known as the gang enhancement statute. *Id.*

A jury found defendant guilty of aggravated burglary, aggravated assault, and three counts of assault. *See* R165-69. The jury found that defendant acted in concert with two or more persons in committing all of these offenses. *See id.* The jury found defendant not guilty of child abuse and not guilty on one count of assault. On November 17, 2006, the trial court imposed judgment, sentencing defendant to a prison term of 9 years to life on the aggravated burglary count; a concurrent prison term of 1 to 15 years on the aggravated assault count; and concurrent jail terms of 60 days on each of the assault counts. R188-89.

Defendant timely appealed. R196.

STATEMENT OF THE FACTS

The crime

The victims in this case were Adrian Ramirez and his family members, including his brother Jorge Ramirez. See R15-17; 165-69. The perpetrators were defendant, who was Adrian's cousin, and defendant's friends—Jorge Urias; Genaro Velasquez, also known as "Angel"; Miguel Flores, also know as "La Borrega" or "the sheep"; and another male known as "La Diabla." R204:26-29; State's Exhibit 2.

On December 24, 2005, defendant arranged for his cousin, Adrian Ramirez, to purchase cocaine from defendant's friend, Jorge Urias. R204:13. Adrian purchased $20 worth of cocaine on behalf of another cousin, Jose Luis Ramirez. R204:14; State's Exhibit 2. At some point, Jose Luis decided to return the cocaine "[b]ecause it did not work." R204:15. Jorge Urias returned Jose Luis's money. *Id.* The return of the cocaine resulted in the criminal episode for which defendant was charged. *Id.*

On December 31, 2005, New Year's Eve, Adrian was at home with his brother, Jorge Ramirez, and Jose Luis. R204:18. Around 3:00 a.m. on January 1, 2006, Jorge Ramirez woke Adrian to tell him that defendant had just telephoned and was on the line. R204:19. When Adrian took the phone, defendant told Adrian that "[h]e was going to f___ us all." R204:20. When Adrian asked why, defendant said it was because the cocaine had been returned to Jorge Urias. *Id.* Defendant told Adrian to "Come over here to Park City so that I can f___ you and your brother." R204:21. Adrian told defendant that he "didn't want to fight with him." *Id.* Defendant became more angry, and Adrian hung up. R204:22. Adrian went back to bed. *Id.*

Sometime after 3:45 a.m., someone knocked on the door of Adrian's family's apartment. R204:23. When Adrian opened the door, defendant thrust his fist into the apartment and hit Adrian. R204:24-25. Defendant had four friends with him—Jorge Urias, "Angel," "La Borrega," and "La Diabla." R204:29; State's Exhibit 2. La Borrega stepped inside and pulled Adrian out of the apartment and into the hallway. R204:26-27; State's Exhibit 2. Jorge Urias, Angel, and La Diabla, all carrying broken bottles, entered the apartment and began fighting with Jorge Ramirez and Jose Luis. R204:105.

After La Borrega pulled Adrian into the hallway, defendant hit Adrian on the face about seven times. R204:27-28. At some point, Adrian's brother Jorge Ramirez, his cousin Jose Luis, and defendant's friends came out the door, and "all of them [began] fighting." R204:30. Defendant's friends were also hitting Adrian. *Id.* Adrian broke away and "went running to the parking lot," where he hid underneath a truck. R204:30-35. Back in the hallway, Angel used a bottle to cut Jorge Ramirez three times. R204:111.

Florina Chavez, Adrian's mother, stepped out into the hallway, trying to separate the fighters. R204:113. She said to defendant, "Go on home, son. What are you doing fighting? It's too late." *Id.* Then Ruben Ramirez, Adrian's father, stepped outside. R204:114. He "was able to separate [his] family from [defendant] and [defendant's] friends." R204:115. As he stepped back with his family, Jorge Urias was "waving the switchblade at [him]." *Id.*

Ruben continued backing up, keeping his family behind him and holding his arms spread out. R204:116. Jorge Urias continued to flash his knife, and defendant yelled that

"he was going to f___ [Jorge Ramirez] up." R204:117. Defendant said to Jorge, "I'm going to kill you, dog." *Id.*

After he had backed the family into the home, Ruben and the family members slammed the door closed. *Id.* Defendant and his friends were on the other side, "pushing hard . . . [and] kicking on the door." *Id.* Eventually, defendant and his friends stopped pushing the door. R204:118.

Defendant left the hallway and went to the parking lot where he found Adrian hiding under the truck. R204:36. After defendant found Adrian, all of defendant's friends "arrived" and "grabbed [Adrian] and all of them started hitting [him]." R204:37. "[A]ll five of them" joined in. R204:38. Defendant sat on Adrian's chest, holding him down. *Id.* La Borrega held Adrian's feet down. *Id.* Defendant said, "You're going to die, dog." R204:39. Defendant said, "Hand me the knife." *Id.* He continued, "Pass me the knife, mother f___er." *Id.* Adrian could feel defendant sitting on his chest. R204:40. Just before passing out, Adrian felt his head being cut. *Id.*

Back in the apartment, Jorge Ramirez realized that Adrian wasn't there. R204:118. Jorge, his sister Berenice, and Jose Luis went outside to look for Adrian. *Id.* Jorge's sister, Adalee, and his girlfriend, Rosa Solis, called the police. *Id.* Berenice and Jose Luis found Adrian lying in the snow, unconscious. R204:119. Adrian was bleeding heavily, he would not wake up, and his eyes had rolled back. *Id.* The family took Adrian to the hospital. R204:121. On their way to the hospital, they passed defendant and his friends driving in a small car, apparently slipping on the snow. *Id.*

Adrian awoke in the hospital. R204:51. Among his injuries were a large gash and some skin missing on the side of his head; bottle cuts on the neck, shoulder, chest; and a bruise where he had been kicked in the ribs. R204:52-58. The cut to the head required stitches and caused permanent scarring. R204:58.

Asked whether he knew of any reason for defendant's anger, other than Jorge Ramirez's having returned the cocaine, Adrian testified, "I don't know. It might have been his." R204:60.

Defendant's version

Defendant claimed that that his friend Jorge Urias told him that his cousins were angry "because of [the] bad drugs that they said he sold them." R206:175. Defendant claimed that he went with his friends to the Ramirez apartment, "trying to be a mediator," because he "wanted to fix the problem between them." R206:175-76.

SUMMARY OF ARGUMENT

1. Defendant claims that the acquittal on the charge of simple assault against Rosa Solis is inconsistent with the guilty verdict for aggravated burglary. This claim is unpreserved. Defendant has not argued any exception to the preservation rules. This Court should decline to review this claim. In any case, the two verdicts were not inconsistent. Moreover, even if the two verdicts were inconsistent, the inconsistency would not require reversal of defendant's conviction for aggravated burglary.

2. Defendant claims that the jury instructions did not adequately set forth the elements of aggravated robbery and argues, specifically, that they did not set forth the necessary intent. Defendant's claim is unpreserved. While he argues that this Court

should review his claim for manifest injustice, he affirmatively approved the jury instructions below, thereby inviting the alleged error and foreclosing review for manifest injustice. He also argues that counsel was ineffective for not objecting to the instructions. This claim fails, however, because the instructions accurately and adequately defined the elements of aggravated burglary, including the necessary intent, and accurately set forth the elements of the gang enhancement.

3. Defendant claims that trial counsel was ineffective for not maintaining contact with him and not more fully consulting with him in preparation for trial. This claim fails because the trial court found, and defendant does not dispute, that defendant was responsible for the lack of contact.

4. Defendant claims that the trial court should have granted his motion to dismiss the aggravated burglary count, arguing that the evidence was insufficient to support a finding that he intended to enter the apartment. He also argues that the evidence does not support a finding that the aggravated burglary was committed in concert with two or more persons. Defendant preserved only the first claim. The second claim is unpreserved, and this court should decline review of that claim. Moreover, defendant has not marshaled the evidence with respect to either claim. This court should therefore assume the evidence supported the findings underlying the trial court's denial of his motion. In any event, during its case-in-chief, the State presented evidence from which a reasonable jury could find that aggravated robbery and the gang enhancement had been proven beyond a reasonable doubt.

5. Defendant claims that the evidence is insufficient to support the guilty verdict on the aggravated burglary count and the finding that defendant committed the felony in concert with two or more others. Defendant has inadequately briefed this claim. He has not indicated whether it was preserved below. It apparently was not. He has not argued any exception to the preservation rule. He has not marshaled the evidence in support of the jury findings or adequately briefed his claim. This Court should deny review of the claim and/or assume that the evidence supported the jury's findings. In any case, the evidence sufficed.

6. Defendant has not argued, much less demonstrated, that a biased juror sat. He therefore cannot prevail on his claim that the trial court erred in granting or denying any challenge to a juror for cause.

7. Defendant's claim that he was denied his Sixth Amendment right to a jury drawn from a fair cross-section of the community is untimely and lacks record support.

8. Defendant claims that the trial court should sua sponte have declared a mistrial when a witness volunteered that defendant had threatened his family. This claim is unpreserved. Defendant has not argued any exception to the preservation rule. He has inadequately briefed his claim. For these reasons, this Court should deny review of his claim. In any case, the trial court had no duty to sua sponte declare a mistrial. No manifest necessity existed for a mistrial, and an alternative to a mistrial existed. Rather than declare a mistrial, the trial court struck the volunteered testimony. In addition, the jury instructions admonished the jury not to consider any evidence that was stricken.

9. Defendant's claim that the trial court erred for not sua sponte including a lesser included instruction on criminal trespass is unpreserved. He has not argued any exception to the preservation rule. Moreover, because defendant affirmatively approved the instructions below, he invited any error, and review for plain error or manifest injustice is therefore unavailable.

10. Defendant moved under rule 23B, Utah Rules of Appellate Procedure, for remand to the district court for findings necessary to a determination of ineffective assistance of counsel claims. This Court denied that motion, and defendant now asks the Court to reconsider that denial. Because defendant has made no non-speculative allegation of facts and has provided no legal support for his request for reconsideration, the Court should deny it.

ARGUMENT

I.

THE GUILTY VERDICT FOR AGGRAVATED BURGLARY WAS NOT INCONSISTENT WITH THE ACQUITTAL FOR SIMPLE ASSAULT AGAINST ROSA SOLIS; BUT EVEN WHERE VERDICTS ARE INCONSISTENT, THE INCONSISTENCY DOES NOT REQUIRE REVERSAL

Defendant first claims that "the verdict of not guilty as to count 7 is inconsistent with the aggravated burglary conviction and a new trial should be ordered." Appellant's Br. at 21 (capitalization and boldface omitted).

A. Defendant's claim is unpreserved. Moreover, because defendant has not argued plain error or any other exception to the preservation rules, this Court should not review his claim.

At the outset, defendant's claim fails because it is unpreserved and because he has argued no exception to the preservation rules. Under the Utah Rules of Appellate Procedure, an appellant is required to include in his brief a "citation to the record showing that the issue was preserved in the trial court" or "a statement of grounds for seeking review of an issue not preserved in the trial court." Utah R. App. P. 24(a)(5)(A) & (B). "An issue is properly raised [and therefore preserved] in the trial court if: (1) the issue is raised in a timely fashion; (2) the issue is specifically raised; and (3) the issue is supported by evidence or relevant legal authority." *Hatch v. Davis*, 2004 UT App 378, ¶ 56, 102 P.3d 774 (citing *Badger v. Brooklyn Canal Co.*, 966 P.2d 844, 847 (Utah 1998)).

"[I]n general, appellate courts will not consider an issue, including constitutional arguments, raised for the first time on appeal unless the trial court committed plain error or the case involves exceptional circumstances." *State v. Dean*, 2004 UT 63, ¶ 13, 95

P.3d 276 (citing *State v. Holgate,* 2000 UT 74, ¶ 11, 10 P.3d 346). A party seeking review of an unpreserved issue must "articulate the justification for review in the party's opening brief." *State v. Pinder*, 2005 UT 15, ¶ 45, 114 P.3d 551 (citing *Coleman v. Stevens*, 2000 UT 98, ¶ 9, 17 P.3d 1122). When a party fails to do so, an appellate court may refuse to consider the unpreserved issue. *Id.* at ¶¶ 50, 58 (refusing to consider Pinder's unpreserved claims because he "failed to argue plain error or show exceptional circumstances on appeal").

Here, as his "Citation to the Record" in connection with this claim, defendant references the pages of the record that include the verdict forms. *See* Appellant's Br. at 2 (citing R154-158). The verdict forms do not show that any issue was raised, much less that it was timely and specifically raised. Moreover, the verdict forms do not reference any evidence or relevant legal support for a claim. Defendant's cite thus does not show that any issue with respect to inconsistent verdicts was raised and preserved in the trial court.[1]

Moreover, defendant has not argued any justification for review of his unpreserved claim. The "inconsistent verdicts" claim is briefed on pages 21-23 of Appellant's Brief. These pages do not mention "plain error" or any other exception to the preservation rule, nor do they set forth an argument explaining why any exception should apply to this

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[1] Neither has the State in its review found any location in the record where defendant preserved this claim.

claim. Because defendant has not articulated a justification for review of his unpreserved claim, this Court may decline to review it.

B. The verdicts are not inconsistent.

Even if this Court were to reach defendant's claim, the claim fails on the merits. First, the verdicts are not inconsistent. The jury found defendant not guilty on count 7, the charge of simple assault against Rosa Solis. R166. Defendant claims that the verdict on count 7 is inconsistent with the guilty verdict on count 1, aggravated burglary. Defendant claims that "the evidence as to entry into the premises was provided substantially by Rosa Solis." Appellant's Br. at 21. Defendant continues, arguing that the acquittal on the charge of simple assault against Rosa "is factually and legally inconsistent with the Aggravated Burglary count and creates a factual inconsistency. . . . if [Rosa] who testified that she was assaulted inside the residence specifically by [defendant] was found by the jury not to have been assaulted inside the residence, the jury should have also concluded that there was insufficient evidence to find [defendant] guilty of Aggravated Burglary." *Id.* at 22.

Defendant's claim is meritless. The jury instructions told the jury members that to find defendant guilty of simple assault against Rosa, they must find that he attempted to do bodily injury to Rosa, threatened to do bodily injury to Rosa, created a substantial risk of bodily injury to Rosa, or caused bodily injury to Rosa. R148. The instructions told them that to find defendant guilty of aggravated burglary, they must find the defendant entered into a building with the intent to commit a felony, theft, or assault *on any person*, and that in the course of attempting, committing, or fleeing, the defendant or another

participant in the crime caused bodily injury *to any person*, used or threatened the immediate use of a dangerous weapon against *any person*, or possessed or attempted to use a dangerous weapon. R154.

The jury's acquittal on count 7 meant only that the jury did not find beyond a reasonable doubt that defendant attempted or threatened to do bodily injury to Rosa or that he caused a substantial risk of or did cause bodily injury to Rosa. It did not mean that he did not have the intent to do bodily injury to someone when he entered the apartment. Moreover, it did not mean that he did not attempt or threaten to do bodily injury to someone other than Rosa or that he did not cause a substantial risk of or did not cause bodily injury to someone other than Rosa. In fact, the State presented evidence to show that defendant and his friends injured Adrian, Jorge Ramirez, and Jose Luis during assaults at the apartment and when fleeing from the scene. The verdicts are not inconsistent.

C. In any event, inconsistent verdicts do not require reversal.

Furthermore, even assuming that the verdicts were inconsistent, that "alone is not sufficient to overturn [a] conviction." *State v. Hancock*, 874 P.2d 132, 134 (Utah App. 1994). Rather, the question on review of such a claim is simply whether the evidence suffices to support the jury verdict. *State v. Stewart*, 729 P.2d 610, 613 (Utah 1986). Review for sufficiency of the evidence "should not be confused with the problems caused by inconsistent verdicts." *Id.* The State's burden is to "convince the jury with its proof" and to "satisfy the courts that given this proof the jury could rationally have reached a verdict of guilt beyond a reasonable doubt." *Id.* (quoting *United States v. Powell*, 469

U.S. 57, 65 (1984)). "This review should be independent of the jury's determination that evidence on another count was insufficient." *Id.* (quoting *Powell*, 469 U.S. at 67). "Further safeguards against jury irrationality are [not] necessary." *Id.* (quoting *Powell*, 469 U.S. at 67).

In other words, while a conviction will be reversed where the evidence, viewed in a light favorable to the verdict, is insufficient to support the verdict, a conviction will not be reversed because the guilty verdict underlying the conviction may be inconsistent with an acquittal on another count. The United States Supreme Court has explained that "[i]nconsistent verdicts . . . present a situation where 'error,' in the sense that the jury has not followed the court's instructions, most certainly has occurred, but it is unclear whose ox has been gored." *Powell*, 469 U.S. at 65. The jury may have properly reached its guilty verdict "and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion" on some other count. *Id.* The prosecution, however, "has no recourse if it wishes to correct" such error; it "is precluded from appealing or otherwise upsetting such an acquittal by the Constitution's Double Jeopardy Clause." *Id.*

Thus, "[t]he most that can be said . . . is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt." *Id.* (quoting *Dunn v. United States*, 284 U.S. 390 (1932) (internal quotation marks omitted)).

For this reason, the United States Supreme Court has "reject[ed], as imprudent and unworkable, a rule that would allow criminal defendants to challenge inconsistent verdicts on the ground that in their case the verdict was not the product of lenity, but of

some error that worked against them." *Id.* at 66. The Utah Supreme Court has also rejected such a rule. *See Hancock*, 874 P.2d at 134 ("In Utah, 'it is generally accepted that the inconsistency of verdicts is not, by itself, sufficient ground to set the verdicts aside.'") (quoting *Stewart*, 729 P.2d at 613-14). Rather, a defendant must show that "there was [not] sufficient evidence for the jury to conclude, beyond a reasonable doubt," that the defendant committed the crime for which he was convicted. *See Stewart*, 729 P.2d at 614.

Thus, defendant's claim that the verdicts were inconsistent fails. The verdicts were not inconsistent. Even if they were, an inconsistency would not of itself require reversal of the conviction based on the guilty verdict. Rather, defendant would have to establish that the evidence, viewed in the light most favorable to the guilty verdict, was insufficient.

Defendant claims insufficiency of the evidence in another point of his argument. The State addresses that claim below.

II.

DEFENDANT CANNOT ESTABLISH MANIFEST INJUSTICE WHERE HE AFFIRMATIVELY APPROVED THE JURY INSTRUCTIONS: MOREOVER, COUNSEL WAS NOT INEFFECTIVE FOR NOT OBJECTING TO THE INSTRUCTIONS, WHICH PROPERLY SET FORTH THE ELEMENTS OF AGGRAVATED BURGLARY AND THE ENHANCEMENT

Defendant next claims that his conviction for aggravated burglary "was based upon jury instructions that did not adequately define the first degree felony offense and failed to instruct of specific intent." Appellant's Br. at 23 (capitalization and boldface

omitted). Defendant objects specifically to jury instructions 26, 33, 34, and 35 (attached in **Addendum B**). *See id.* at 23-33.

A. Defendant invited any error, thereby foreclosing review of his unpreserved claim for manifest injustice.

Defendant acknowledges that his claim his unpreserved. *See id.* at 23. He claims, however, that this Court may review his claim under the doctrine of "manifest injustice." *See id.* Because defendant invited any error in the jury instructions, review for manifest injustice does not lie.

"While a party who fails to object to or give an instruction may have an instruction assigned as error under the manifest injustice exception, Utah R. Crim P. 19(e), a party cannot take advantage of an error committed at trial when that party led the trial court into committing the error." *State v. Geukgeuzian*, 2004 UT 16, ¶ 9, 86 P.3d 742 (internal quotation marks and citation omitted). "Accordingly, a jury instruction may not be assigned as error even if such instruction constitutes manifest injustice 'if counsel, either by statement or act, affirmatively represented to the court that he or she had no objection to the jury instruction.'" *Id.* (quoting *State v. Hamilton*, 2003 UT 22, ¶ 54, 70 P.3d 111).

Utah courts "have recognized a number of ways in which a defendant has led a trial court into committing error." *Id.* at ¶ 10. A defendant invites error "where his counsel confirm[s] on the record that the defense ha[s] no objection to the instructions given by the trial court." *Id.* He invites error "when he fail[s] to object to an instruction when specifically queried by the court." *Id.* He also invites error when "his proposed

jury instruction effectively le[ads] the trial court into adopting the erroneous jury instruction that he now challenges on appeal." *Id.* at ¶ 12.

Here, the trial court and the parties conducted off-the-record discussions of the jury instructions. The court then asked the parties "to make a record as to the instructions that were or were not given." R206:265. The prosecutor stated that he "believe[d] the instructions given were appropriate." R206:265-66. The court observed that some changes had been made in the instructions pursuant to requests from defense counsel. R206:266. The court also observed that, in those instances where changes had been requested, but not made, the court had noted on the instructions why they had not been given. *Id.* Defense counsel then stated, "My only objection, your Honor, would be to instruction number 36. It's duplicative of instruction 40, I believe." *Id.* Defense counsel thereby affirmatively represented to the court that he had no objection to any other instruction in its final form. By so doing, he invited any error as to the instructions he now claims were erroneous. For this reason, the jury instructions about which he now complains may not be assigned as error even if they constitute manifest injustice.

B. Defendant has not shown that trial counsel was ineffective.

Defendant claims that trial counsel was ineffective for not "request[ing] appropriate instructions." Appellant's Br. at 29. This claim also fails.

To show ineffective assistance of counsel, a defendant must establish both prongs of the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), which holds that such claims succeed only if the defendant demonstrates: (1) that his counsel's performance "fell below an objective standard of reasonableness" and (2) that counsel's

performance prejudiced the defendant. *Id.* at 687-88; *see also State v. Strain*, 885 P.2d 810, 814 (Utah App.1994). To demonstrate prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

A defendant's burden is extremely high. An ineffective assistance claim can "succeed[ ] only when no conceivable legitimate tactic or strategy can be surmised from counsel's actions." *State v. Perry*, 899 P.2d 1232, 1241 (Utah App.1995) (citation and quotations omitted). Counsel's failure "to make motions or objections [that] would be futile if raised does not constitute ineffective assistance." *State v. Whittle*, 1999 UT 96, ¶ 34, 989 P.2d 52 (quotations and citations omitted).

1. The instructions accurately and adequately defined the elements of aggravated burglary, including the necessary intent. Counsel therefore had no reason to submit different instructions, and his performance did not fall below an objective standard of reasonableness or prejudice defendant.

As explained below, the instructions were not erroneous. Defendant therefore had no reason to request different instructions. His performance was neither deficient nor prejudicial.

Defendant claims that the jury instructions did not adequately define aggravated burglary. Specifically, he claims that the instructions did not define the intent necessary to commit the crime and that they gave the jury "the option of convicting [him] as if he was present with other parties who may have intended to enter the residence to commit an assault or carry a knife, merely because of association." Appellant's Br. at 29-30. He

claims that he "never had any specific intent to fight when he went to the apartment and [therefore] never committed a First Degree Felony." *Id.* at 30.

The jury instructions, however, were clear. Instruction 26 stated that to find defendant guilty of aggravated burglary, the jury had to find that he "entered or remained unlawfully . . . in a building or any portion of a building . . . with the intent to commit a felony, theft, or an assault on any person":

> To convict the defendant on count 1, **AGGRAVATED BURGLARY** you must believe from all of the evidence and beyond a reasonable doubt each of the following elements:
>
> 1. That on or about January 1, 2006,
> 2. in the State of Utah,
> 3. the defendant, as party to the offense,
> 4. entered or remained unlawfully
> 5. in a building or any portion of a building
> 6. with the intent to commit a felony, theft, or an assault on any person,
> 7. and in the course of attempting, committing, or fleeing,
> 8. the defendant or another participant in the crime:
>   (a) caused bodily injury to any person who was not a participant in the crime,
>   (b) used or threatened the immediate use of a dangerous weapon against any person who was not a participant in the crime; or
>   (c) possessed or attempted to use a dangerous weapon.

R154.

As written, the instructions required the jury to find that "defendant, as party to the offense" had "the intent to commit a felony, theft, or an assault on any person." R154. The instructions also defined "party to the offense" to mean "[e]very person, acting with the mental state required for the commission of an offense who directly commits the offense, who solicits, requests, commands, encourages, or intentionally aids another

person to engage in conduct which constitutes [the] offense." R144. Thus, the instructions did not permit a guilty verdict upon a finding that some other person had that intent where defendant did not. While defendant may have been found guilty based upon the acts of co-participants, he could not have been found guilty based upon their intent. Thus, he was not found guilty "merely because of association" or simply because his co-participants had the intent to enter the Ramirez apartment.[2]

2. Instructions 33-35 adequately set forth all elements necessary for finding that defendant acted "in concert" with two or more others. Counsel therefore had no reason to submit different instructions, and his performance did not fall below an objective standard of reasonableness or prejudice defendant.

Defendant also objects to instructions 33-35, which he apparently claims do not adequately set forth the mental intent required to support a finding that a defendant committed a crime in concert with two or more persons. *See* Appellant's Br. at 28-33. Relying on *State v. Lopes*, he argues that a jury must "find[], based upon proof beyond a reasonable doubt, 'that all three actors . . . possessed a mental state sufficient to commit the same underlying offense and . . . directly committed the underlying offense or

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[2] The instruction provided that defendant must have entered or remained "with the intent to commit a felony, theft, or an assault on any person." Defendant suggests that the trial court had a duty to sua sponte define what acts might have constituted a felony. In making the suggestion, defendant relies on a California case, *People v. Failla*, 414 P.2d 39 (Cal. 1966). That case is inapposite. It treated factual circumstances under which the defendant may have been convicted of burglary on the basis of entering a building with the intent to commit an act that, while wrongful or even criminal, was not a felony or a theft or an assault. Thus, guidance from the court as to what may have constituted a felony was required. Here, however, the evidence did not suggest that the jury may have thought defendant committed some act that was a non-applicable misdemeanor or non-crime and, on the basis of defendant's intent to commit that act, found him guilty of burglary.

solicited, requested, commanded, encouraged, or intentionally aided on[e] of the other two actors to engage in conduct constitut[ing] the underlying offense.'" Appellant's Br. at 28-29 (quoting *Lopes*, 1999 UT 24, ¶ 8, 980 P.2d 191).

Defendant's claim, however, rests on the Utah Supreme Court's interpretation of a former version of Utah Code Ann. § 76-3-203.1. When Lopes committed a murder in February 1996, the 1995 version of that statute was in effect. The 1995 version did, in fact, require "that all three actors . . . possessed a mental state sufficient to commit the same underlying offense." *Lopes*, 1999 UT 24, ¶ 8. The 1995 version read in part:

> (1) (a) A person who commits any offense listed in Subsection (4) *in concert* with two or more persons is subject to an enhanced penalty for the offense as provided below.
>
> (b) "*In concert* with two or more persons" as used in this section means the defendant and two or more of the other persons would be criminally liable for the offense as parties under Section 76-2-202.

Utah Code Ann. § 76-3-203.1(1)(a) & (b) (1995) (emphasis added). Section 76-2-202 stated at the time, as it does now, that a person who acts "with the mental state required for the commission of an offense" and "directly commits the offense, [or] solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable as a party for such conduct." Utah Code Ann. § 76-2-202 (West 2004).

In an amendment to section 76-3-203.1, effective March 14, 2000, the legislature redefined "in concert." *See* 2000 Utah Laws 717. That amendment established the current definition of "in concert," the definition applicable in January 2006 when defendant committed the offenses for which he was convicted. The current version of the

statute does not require that all three actors possess a mental state sufficient to commit the same underlying offense. Rather, it provides in relevant part:

> (1)(a) A person who commits any offense listed in Subsection (4) is subject to an enhanced penalty for the offense as provided in Subsection (3) if the trier of fact finds beyond a reasonable doubt that the person acted in concert with two or more persons.
>
> (b) "In concert with two or more persons" as used in this section means the defendant was aided or encouraged by at least two other persons in committing the offense and was aware that he was so aided or encouraged, and each of the other persons:
>
> (i) was physically present; or
>
> (ii) participated as a party to any offense listed in Subsection (4).
>
> (c) For purposes of Subsection (1)(b)(ii):
>
> (i) other persons participating as parties need not have the intent to engage in the same offense or degree of offense as the defendant; and
>
> (ii) a minor is a party if the minor's actions would cause him to be a party if he were an adult.

Utah Code Ann. § 76-3-203.1 (West Supp. 2006).

Thus, under the version of the statute in effect at the time of defendant's offenses, a jury could find that a defendant acted "in concert" with other persons if those persons aided or encouraged defendant and were physically present. *See id.* Alternatively, a jury could find that a defendant acted "in concert" with other persons if those persons "aided or encouraged" defendant and, while not physically present, "participated as parties to any of various enumerated offenses." *See id.* Even under the latter circumstances, those persons "need not have had the intent to engage in the same offense or degree of offense as the defendant." *See id.*

The jury instructions accurately set forth the elements. Instruction 26, reproduced in its entirety in **Addendum B,** told the jury members that if they found defendant guilty on any count, they should then determine whether defendant acted "in concert with two or more persons." R147. Instruction 34, also reproduced in its entirety in **Addendum B**, defined "in concert with two or more persons" tracking the language of the statute relevant at the time of the offense. *See* R145. It also defined "party to the offense" in the language of the section 76-2-202. *See* R144.

The instructions were accurate. Because the instructions were accurate, defense counsel was not deficient for not objecting to them, and defendant suffered no prejudice as a result of counsel's not objecting.[3]

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[3] Defendant also argues that trial counsel was ineffective for "allow[ing] the issue of gang enhancement to be submitted at the same time as the issue of accomplice liability to the underlying charges." Appellant's Br. at 33. He asserts that "this procedure . . . caused an improper verdict." *Id.* This claim contains no legal support and no analysis. It is inadequately briefed, and this Court should therefore decline to review it. *See* Utah R. App. P. 24(a)(9) (requiring an appellant's brief to set forth an argument that "contain[s] the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on"); *see also State v. Green*, 2004 UT 76, ¶ 15, 99 P.3d 820 (quoting *State v. Thomas*, 961 P.2d 299, 305 (Utah 1998)) ("'It is well established that a reviewing court will not address arguments that are not adequately briefed.'"). In any case, the verdict forms told the jury members to first consider whether defendant was guilty on each count and to make a special finding about whether defendant did or did not act "in concert" with others "only if [they] ha[d] found the Defendant guilty" on the count. *See* R166-69. Thus, the jury deliberated twice on each count of conviction. Defendant does not explain how or why this procedure would have caused an improper verdict.

III.

DEFENDANT WHO, WITHOUT REASON, FAILED TO MAINTAIN CONTACT WITH DEFENSE COUNSEL, HAS NOT ESTABLISHED THAT COUNSEL WAS INEFFECTIVE FOR NOT MORE FULLY CONSULTING WITH HIM DURING PREPARATION FOR TRIAL

Defendant claims that trial counsel was ineffective for not preparing more fully for trial. Specifically, he claims that counsel's "acknowledgement . . . that he needed additional time to prepare and had not been sufficiently in contact with [defendant]" evidenced ineffective assistance. Appellant's Br. at 34.

Defendant has not adequately briefed this issue. While his brief sets forth the *Strickland* standard for making out an ineffective assistance claim, he cites no authority for his claim that counsel was deficient for not finding and contacting defendant when defendant failed to keep in contact. Thus, his claim is inadequately briefed, and this Court should decline to review it. In any case, defendant has not met the *Strickland* standard. He has shown neither deficient performance nor prejudice.

Proceedings below. Prior to trial, defense counsel moved to continue trial because he "had not had an opportunity to adequately discuss and prepare for the case" and "hadn't been in contact with [his] client." R205:7. The trial court denied the motion, finding that defendant was responsible for the lack of contact. The court found, "It is clear that the Defendant had for a period of time not kept in contact with his counsel." R205:8. The court further found that there had "been no evidence presented . . . that the Defendant was in any way unable to make contact with his counsel." R205:8. The court found that defendant had "retained counsel from the very beginning of this case," but that

defendant "had for a period of time not kept in contact with his counsel." R205:8. The court ruled that defendant had a duty to maintain contact with his counsel and found that he had no legitimate reason for not doing so. R205:9. Nothing in the court's findings or in the record suggests that counsel was responsible for the lack of contact.

Analysis. Defendant claims that counsel was deficient for not contacting him and suggests that he was prejudiced. *See* Appellant's Br. at 33-34. He does not, however, dispute the trial court's findings that he, not counsel, was responsible for the lack of contact. *See id.* Defendant's claim is therefore defeated by the facts as found by the trial court.

Further, the claim is without record support. Nothing in the record suggests that counsel did not attempt to contact defendant. Nothing in the record suggests what information counsel might have obtained from defendant that would have changed his defense or made a difference in the result. Thus, the record supports neither a determination that counsel was deficient nor a determination that defendant was prejudiced. Because defendant has not provided a record adequate to support his claim, this court must presume that counsel performed effectively. *See State v. Litherland*, 2000 UT 76, ¶ 17, 12 P.3d 92 (stating that a defendant bears the burden of proof on an ineffective assistance of counsel claim and that when the record is "inadequate in any fashion, ambiguities or deficiencies resulting therefrom simply will be construed in favor of a finding that counsel performed effectively").

IV.

BECAUSE THE STATE PRODUCED EVIDENCE CAPABLE OF SUPPORTING A GUILTY VERDICT ON BOTH THE AGGRAVATED BURGLARY COUNT AND THE GANG ENHANCEMENT, THE TRIAL COURT PROPERLY DENIED THE MOTION FOR A DIRECTED VERDICT

Defendant claims that the trial court should have granted his motion to dismiss the aggravated burglary count, arguing that the evidence was insufficient to support a finding that defendant intended to enter the apartment. Appellant's Br. at 36. He also argues that the evidence did not support a finding that the aggravated burglary was committed in concert with two or more persons. *Id.*

Proceedings below. After the State rested, defendant moved for a directed verdict on count 1 (aggravated burglary), count 3 (assault on Ruben Ramirez), and count 4 (assault on Florina Chavez). R206:64. Defense counsel argued that the State had not "presented evidence that the defendant had intent to commit a felony, a theft or an assault, as required by Count 1." R206:95. Counsel also argued that the State had not "show[n] that [defendant] possessed a dangerous weapon, used it, or threatened with a dangerous weapon." *Id.* Counsel made no argument concerning the "in concert" enhancement. *See id.*

Applicable law. "When evaluating whether the State produced sufficient believable evidence to withstand a challenge at the close of the State's case in chief, [the reviewing court] appl[ies] the same standard used when reviewing a jury verdict. Hence, believable evidence in this context means the evidence must be capable of supporting a finding of guilt beyond a reasonable doubt." *Hamilton*, 2003 UT 22, ¶ 41 (internal

quotation marks and citation omitted). "[I]f upon reviewing the evidence and all inferences that can be reasonably drawn from it, the court concludes that some evidence exists from which a reasonable jury could find that the elements of the crime had been proven beyond a reasonable doubt, [the court] will uphold the denial of a motion to dismiss." *Id.* (internal quotation marks and citation omitted).

Analysis. At the outset, defendant's claim fails because he preserved only a portion of his claim and did not argue any exception to the preservation rules to justify review of the unpreserved portion. It fails also because defendant did not marshal the evidence in support of the findings he now challenges on appeal.

Defendant preserved this claim only with respect to the issue of whether defendant entered the apartment with the intent to commit a felony, theft, or assault. He did not claim below that the evidence was insufficient to support the "in concert" enhancement and makes no plain error or exceptional circumstances argument to justify review on appeal. This Court may therefore decline review of defendant's claim regarding the enhancement. *See Pinder*, 2005 UT 15, ¶ 45 (stating that court may refuse to consider unpreserved issue where defendant does not articulate exception to preservation rules).

Defendant's claim that the trial court erred in denying his motion to dismiss the aggravated burglary charge is a challenge to a trial court's finding. If a challenge is made to a finding, an appellant must marshal all evidence in favor of the facts as found by the trial court and then demonstrate that, viewing the evidence in a light most favorable to the court below, the evidence is insufficient to support the finding of fact. *See State v. Gamblin*, 2000 UT 44, ¶ 17 n. 2, 1 P.3d 1108 (stating that an appellant wishing to

challenge a trial court's findings of fact must not only marshal the evidence in support of the findings, but also "show that the trial court's findings so lack support as to be against the clear weight of the evidence, thus making them clearly erroneous") (quotations and citations omitted). "If an appellant fails to marshal the evidence, the appellate court assumes that the record supports the findings of the trial court and proceeds to a review of the accuracy of the lower court's conclusions of law and the application of that law in the case." *State v. Larsen*, 828 P.2d 487, 490 (Utah App. 1992) (quoting *Saunders v. Sharp*, 806 P.2d 198, 199 (Utah 1991)) (internal quotation marks omitted). Moreover, any attempt by defendant to "marshal" his evidence by listing it in an addendum does not comply with the marshaling requirement. *See A. K. & R. Whipple Plumbing and Heating v. Aspen Const.*, 977 P.2d 518, 525 (Utah App. 1999). An "addendum does not include a properly focused marshaling of the evidence supporting particular findings under attack, but rather is a comprehensive catalogue of all testimony in the record." *Id.* Thus, listing evidence in the addendum does not meet the marshaling requirement.

Defendant did not marshal the evidence. See Appellant's Br. at 35-36. While he refers to evidence set forth in his addendum, the addendum simply contains a summary of the testimony given at trial. *See id.* (Addendum at 37-60). It does not include a properly focused marshaling of the evidence supporting the finding under attack, and it does not meet the marshaling requirement. This Court should therefore assume the evidence supported the findings underlying the trial court's determination. *See Larsen*, 828 P.2d at 490.

In any case, the evidence presented at trial was capable of supporting a verdict that defendant committed aggravated robbery. Specifically, the evidence sufficed to show that defendant entered the Ramirez apartment with the intent to commit an assault. Adrian testified that defendant had telephoned to express his anger, had stated that "[h]e was going to f___ us all," had thereafter appeared at the threshold of the Ramirez apartment, and, immediately after the door was opened, thrust his fist into the apartment and hit Adrian. R204:20-25. This evidence, while circumstantial as to defendant's intent, sufficed to support a finding that he entered with the intent to commit an assault. *See State v. Holgate*, 2000 UT 74, ¶ 26, 10 P.3d 346 (noting that "intent is rarely established by direct evidence," stating that it "may be proven by circumstantial evidence," and holding that a reviewing court "must look to the circumstantial evidence and all reasonable inferences drawn therefrom to determine whether the evidence to support the verdict was completely lacking or was so slight and unconvincing as to make the verdict plainly unreasonable and unjust") (internal quotation marks and citations omitted).

Moreover, the evidence sufficed to show that in the course of committing or fleeing the burglary, defendant personally caused bodily injury to Adrian. *See* R204:38-40 (State's evidence that defendant used a knife to cut Adrian while leaving the burglary site). That sufficed to establish aggravated robbery.

Further, defendant, as a party to the crime, was also liable for Jorge Urias's use or threatened use of the knife and his other friends' use or threatened use of broken bottles in the course of attempting, committing, or fleeing from the burglary. *See* RR204:109,

111, 115, 117 (State's evidence that Jorge waved his switchblade at the Ramirez family members, that Jorge Urias, Angel, and La Diabla all carried broken bottles at the time they entered the Ramirez apartment, and that Angel used a bottle to cut Jorge Ramirez three times). That alternatively sufficed to establish aggravated robbery.

The evidence was also sufficient to support a finding that defendant acted in concert with two or more other persons. Adrian testified that defendant was accompanied by at least four friends. R204:29; State's Exhibit 2. After defendant had thrust his fist into the apartment and punched Adrian, one of defendant's friends stepped inside the apartment and pulled Adrian out into the hallway where defendant continued beating him. R204:26-28. The other three friends entered the apartment carrying broken bottles and began fighting with Adrian's brother and cousin. R204:109. After Adrian ran away and hid under the truck, defendant and his friends found him and all of them hit him. R204:37.

This testimony sufficed to support an inference that defendant "was aided or encouraged by at least two other persons in committing the [aggravated burglary] offense and was aware that he was so aided or encouraged." *See* Utah Code Ann. § 76-3-203.1(1)(b). In addition, it sufficed to show that each of the other persons "was physically present," thus fulfilling one of the two alternative additional statutory requirements. *See* Utah Code Ann. § 76-3-203.1(1)(b)(i).

Thus, the trial court properly denied the motion to dismiss at the end of the State's case. The State had presented evidence from which a reasonable jury could find that the

elements of the crime and the enhancing circumstances had been proven beyond a reasonable doubt.

V.

THE EVIDENCE SUFFICED TO SUPPORT DEFENDANT'S CONVICTION FOR AGGRAVATED ROBBERY AND THE FINDING THAT DEFENDANT COMMITTED THE OFFENSE IN CONCERT WITH TWO OR MORE PEOPLE

Defendant claims that the evidence is insufficient to support the guilty verdict on the aggravated burglary count and the finding that defendant committed the felony in concert with two or more others. Appellant's Br. at 36.

Defendant has inadequately briefed this claim also. He has not indicated whether it was preserved below.[4] *See* Appellant's Br. at 36-37. He has not argued any exception to the preservation rule to justify review of his claim on appeal. *See id.* For these reasons, this Court should not review this claim.

Moreover, while defendant has again referenced the summary of testimony set forth in his addendum, he has failed to properly marshal the evidence in support of the jury verdict. *See id.* For this reason, even if this Court should grant review, it should assume the record supports the jury verdict.

In any case, the evidence again sufficed. When reviewing a jury verdict, an appellate court "review[s] the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the verdict of the jury." *State v. Shumway*,

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[4] Nor has the State in its review of the record been able to locate any place where defendant preserved this claim.

2002 UT 124, ¶ 15, 63 P.3d 94. The court "will reverse a jury conviction for insufficient evidence only when the evidence is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted." *Id.* (citation omitted).

In this case, as explained under Point IV, above, the State presented sufficient evidence to support the jury's finding that defendant had the requisite intent to commit aggravated burglary and its finding that defendant acted with two or more persons. Defendant's only remaining claim appears to be that the evidence did not support a finding that he "entered" the apartment. The evidence showed, however, that both defendant and his friends physically entered the Ramirez apartment. When Adrian opened the apartment door, defendant thrust his arm into the apartment to hit Adrian. *See* R204:24-25. This sufficed to support a finding that defendant himself entered the apartment. *See* Utah Code Ann. § 76-6-201(4) (West 2004) ("Enter" means . . . "[i]ntrusion of any part of the body" or "[i]ntrusion of any physical object under control of the actor."); *State v. Isaacson*, 704 P.2d 555, 558 (Utah 1985) (holding that intrusion of defendant's head, hands, and arms through a window constituted an entry). In addition, the evidence showed that after defendant thrust his hand into the apartment, his friends entered the apartment, pulled Adrian into the hallway, and began fighting other family members inside the apartment. *See* R204:26-27, 105. The finding that defendant, as a party to the crime, entered the apartment is supportable on the basis of the entry by other parties to the crime. *See State v. Peterson*, 881 P.2d 965 (Utah App. 1994)

(affirming aggravated burglary conviction of defendant where co-participants entered home while defendant waited at another location).

VI.

BECAUSE HE CANNOT SHOW THAT A BIASED JUROR SAT, DEFENDANT CANNOT PREVAIL ON HIS CLAIM THAT THE TRIAL COURT PLAINLY ERRED IN GRANTING OR DENYING A MOTION TO STRIKE A JUROR FOR CAUSE

Defendant claims that the trial court plainly erred when it granted the State's motion to strike Juror No. 3 for cause "based upon the fact that she had young children and the fact that she had an uncle and a friend who she believed were wrongfully convicted." Appellant's Br. at 37. He further claims that the trial court "committed plain error by denying [his] equivocal challenge of Juror 10 for cause, and by failing to sua sponte remove Juror 10 for cause." *Id.* at 38. He cannot prevail on these claims because he has not demonstrated that a biased juror sat.

Proceedings below. After voir dire, the State moved to strike Juror No. 3 for cause. R205:130. Defense counsel objected. *Id.* The trial court granted the motion, finding that the juror was "internally conflicted in light of her experience and has ongoing doubts about the ability of the justice system to bring forward facts that are and should be considered relevant to her determination." R205:131-132.[5]

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[5] The trial court also removed on its own motion Juror No. 28, who had a nephew in prison and was "clearly conflicted," believed that her nephew had been convicted and imprisoned by a jury that did not know all the facts, and would "continue to think about [her nephew's] situation in this trial." R205:137. Defense counsel "object[ed] for the sake of objecting because [he] th[ought] she would be a good juror." *Id.* Defendant mentions the removal of Juror 28 in his brief, but does not claim that the trial court erred

Applicable law. "Whether to dismiss a prospective juror for cause is within the sound discretion of the trial court. When reviewing such a ruling, [the appellate court] reverse[s] only if the trial court has abused its discretion." *State v. Finlayson*, 956 P.2d 283, 290 (Utah App. 1998) (quoting *State v. Baker*, 884 P.2d 1280, 1281 (Utah App. 1994)) (internal quotation marks and additional citations omitted). "If a defendant believes the trial court erred in failing to dismiss a juror for cause, in order to preserve the error on appeal, a criminal defendant must exercise a peremptory challenge, if one is available, against the juror unsuccessfully challenged for cause." *Id.* (quoting *State v. Baker*, 935 P.2d 503, 510 (Utah 1997)). Moreover, "[e]ven if the trial court has erroneously granted or denied a challenge for cause, . . . to prevail on a claim of error . . . a defendant must demonstrate prejudice, viz., show that a member of the jury was partial or incompetent." *Id.* (quoting *State v. Menzies*, 889 P.2d 393, 398, 400 (Utah 1994) (internal quotation marks omitted)).

Analysis. Defendant has inadequately briefed his claim. While arguing that the trial court denied his "equivocal challenge to Juror No. 10 for cause," defendant has not cited to any place in the record where he made such a challenge.[6] *See* Appellant's Br. at 38. Neither has set forth any reason why he might have challenged Juror No. 10 or any reason for his claim that the trial court should sua sponte have removed that juror. *See id.*

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in removing her. If defendant intended to make some claim of error with respect to this juror, he has not articulated the nature of his claim, and it is therefore inadequately briefed.

[6] Nor has the State in its review of the record been able to locate any place where defendant made such a challenge.

Thus, his claim of error as to Juror 10 is indiscernible. It is inadequately briefed, and this Court need not review it.

Moreover, as to Juror No. 3, defendant has not explained the rationale for the court's granting the State's challenge of Juror No. 3 for cause nor has he explained why the rationale was faulty. *See id.* at 37-38. He has not set forth the law applicable to review of a trial court's decisions regarding challenges for cause. *See id.* at 37-39. For these reasons, this claim, like the claim regarding Juror No. 10, is inadequately briefed, and this Court need not review it.

In any case, the claims fail on the merits. A defendant who claims that a trial court plainly erred in granting or denying a motion to strike a juror for cause must show that a biased juror sat. *Finlayson*, 956 P.2d at 283 (citing *Menzies*, 889 P.2d at 398, 400). Defendant has not alleged, much less demonstrated, that any member of the selected panel was biased. Thus, he cannot prevail on his claim of error based on the trial court's granting of or denying of challenges for cause.

VII.

DEFENDANT'S CLAIM THAT HE WAS DENIED HIS SIXTH AMENDMENT RIGHT TO A JURY DRAWN FROM A FAIR CROSS-SECTION OF THE COMMUNITY IS UNTIMELY

Defendant claims that he "was denied a fair jury panel containing Hispanic persons." Appellant's Br. at 39 (capitalization and boldface omitted). Defendant cannot succeed on this claim, which is untimely and lacks record support.

Applicable law. A defendant has a Sixth Amendment right "to an impartial jury drawn from a fair cross-section of the community." *State v. Young*, 853 P.2d 327, 338

(Utah 1993) (citing *Duren v. Missouri*, 439 U.S. 357, 363-64 (1979); *Taylor v. Louisiana*, 419 U.S. 522, 527-28 (1975); *Hoyt v. Florida*, 368 U.S. 57, 59 (1961)). "[J]ury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." *Duren*, 439 U.S. at 363-64 (quoting *Taylor*, 419 U.S. at 538) (internal quotation marks omitted).

"In order to establish a prima facie violation of the fair-cross-section requirement," a defendant must show first "that the group alleged to be excluded is a 'distinctive' group in the community"; second, "that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community"; and third, "that this underrepresentation is due to systematic exclusion of the group in the jury-selection process." *Id.* at 364.

To establish the existence of a distinctive group, the first prong, a defendant must show "that a particular group [is] of sufficient numerosity and distinctiveness to be cognizable for fair cross-section purposes." *State v. Tillman*, 750 P.2d 546, 575-76 (Utah 1987). To establish the second prong, the defendant must "demonstrate the percentage of the community made up of the group alleged to be underrepresented" and show that that percentage of the venires made up by the group is "not fair and reasonable." *Duren*, 439 U.S. at 364. Finally, to demonstrate the third prong, systematic exclusion, the defendant must show that the "discrepancy occurred not just occasionally," but that it was "inherent in the particular jury-selection process utilized." *Id.* at 366.

Once a defendant has made a prima facie case showing an infringement of his right to a jury drawn from a fair cross section, the State "bears the burden of justifying this infringement by showing attainment of a fair cross section to be incompatible with a significant state interest." *Id.* at 368. If the State demonstrates a significant state interest, the State must also demonstrate that exemptions furthering that interest caused the challenged underrepresentation. *Id.*

The Utah Supreme Court has recently reemphasized that issues of jury composition must be raised before a jury is sworn. "In all of this court's decisions since [*State v. Span*, 819 P.2d 329 (Utah 1991)], we have never deviated from the rule that a challenge to the composition of the jury must be raised before the jury is sworn in. . . . It has therefore long been the law in Utah that constitutional challenges to the composition of the jury—both [to] the venire and to the selected jury—must be raised before the jury is sworn." *State v. Valdez*, 2006 UT 39, ¶ 35, 140 P.3d 1219 (citations omitted).

Analysis. At the outset, defendant cannot prevail on this claim because it is untimely. "[A] constitutional challenge to the jury selection process—whether it be to the entire venire or to the jury selected to try the case—must be brought before the jury is sworn." *Valdez*, 2006 UT 39, ¶ 37. Because defendant raises his claim for the first time on appeal, his claim is untimely.

Moreover, the claim is without record support. Defendant has presented no evidence of the numerosity of Hispanics in the community from which the venire was drawn, the percentage of Hispanics in the population, the percentage of Hispanics in jury pools, or the systematic exclusion of Hispanics from the venires from which jury panels

are selected. *See* Appellant's Br. at 39-41. Thus, defendant has not demonstrated a prima facie violation of his right to a jury drawn from a fair cross section of the community.[7]

VIII.

DEFENDANT CANNOT PREVAIL ON HIS UNPRESERVED CLAIM THAT THE TRIAL COURT SHOULD SUA SPONTE HAVE DECLARED A MISTRIAL

During cross-examination by defense counsel, Jorge Ramirez volunteered the following statement: "I am afraid . . . [b]ecause [defendant] has threatened my wife and we have a little girl and [defendant] has threatened her with her life." R204:127. Defendant moved to strike the statement, and the trial court struck it as "not responsive to the question that was posed." R204:127-28. Defendant made no further objections or requests. He did not request a mistrial, and he did not ask for a cautionary instruction.

On appeal, defendant now claims that the trial court should not only have stricken the statement from the record, but should sua sponte have declared a mistrial because "the inherent prejudice was unfair and created a presumption that the Appellant was a person of bad character." Appellant's Br. at 42.

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[7] Defendant suggests in passing that defense counsel was ineffective for not raising a fair-cross-section challenge. *See* Appellant's Br. at 40. This claim is inadequately briefed. In any case, the record is inadequate to show that defendant could have established a fair-cross-section violation, had he challenged the jury selection process below. A defendant bears the burden of proof on an ineffective assistance claim and when the record is "inadequate in any fashion, ambiguities or deficiencies resulting therefrom simply will be construed in favor of a finding that counsel performed effectively." *State v. Litherland*, 2000 UT 76, ¶ 17, 12 P.3d 92.

Defendant's claim was not preserved below. The preservation rule "applies to every claim, including constitutional questions," unless an appellant alleges and demonstrates "exceptional circumstances" or "plain error." *State v. Holgate*, 2000 UT 74, ¶ 11, 10 P.3d 346. Defendant has neither alleged nor demonstrated exceptional circumstances or plain error. This Court should therefore decline to review his claim.

Moreover, defendant has inadequately briefed his claim. He has cited no support for his claim that a trial court has the duty to sua sponte declare a mistrial under any circumstances, let alone under the circumstances of this case. *See* Appellant's Br. at 41-42. Thus, his claim is inadequately briefed. As explained above, this Court will not address arguments that are inadequately briefed. *See State v. Green*, 2004 UT 76, ¶ 15, 99 P.3d 820.

In any case, defendant could not prevail on this claim even had he argued plain error and adequately briefed his claim. A trial court seldom has a duty to sua sponte declare a mistrial. Some jurisdictions have simply held that in general trial courts have no duty to sua sponte declare mistrials. *See, e.g., Zachary v. State*, 188 S.W.3d 917, 920 (Ark. 2004); *State v. Young*, 137 S.W.3d 65, 69 (Tex. Crim. App. 2004). Other jurisdictions have clarified that although courts may have the authority to sua sponte declare mistrials, that authority is "subject to the constraints of the defendant's right to have his trial completed by a particular jury." *March v. State*, 859 P.2d 714, 717 (Alaska 1993).

This Court has stated that "declaring mistrials sua spont[e] . . . must be indulged with a high degree of caution and circumspection on the part of a trial judge." *State v.*

Dennis, 385 P.2d 152, 153 (Utah 1963) (addressing claim that trial court should sua sponte have declared a mistrial after defense counsel stated to jury that defendant had confessed and would repeat confession on the stand). This Court suggested that any duty to sua sponte declare a mistrial would arise only if the underlying error had "render[ed] the trial a 'farce and a mockery.'" *Id.* at 154 n.2 (citing *People v. Dupree*, 319 P.2d 39 (1957)).

To impose a duty upon trial courts to sua sponte declare mistrials in criminal cases may put them in a position where they are "damned if they do" and "damned if they don't." On the one hand, failure to declare a mistrial may constitute reversible error. On the other hand, declaring a mistrial may result in a double jeopardy violation. One court explained the dilemma in this way:

> Appellate courts are wary of claims that a trial court erred in failing to declare a mistrial *sua sponte* in a criminal case. That is because generally, the double jeopardy clause of the Fifth Amendment to the Constitution of the United States bars retrial if a judge grants a mistrial in a criminal case without the defendant's request or consent. Consequently, a judge who declares a mistrial in a criminal case *sua sponte* may thereafter be confronted by the defendant's contention that he cannot be retried. Reversing convictions because trial courts fail to declare mistrials *sua sponte* allows defendants to remain mute when incidents unfavorable to them occur during trial, gamble on the verdict, then obtain a new trial if the verdict is adverse. This puts trial courts in an untenable position and is contrary to the principle that an appellate court will not, on review, convict a trial court of error on an issue which was not put before it to decide.

State v. Derrick, 965 S.W.2d 418, 420 n.1 (Mo. App. 1998).

Utah cases illustrate circumstances where a trial judge, intending to ensure that a trial was fair, has sua sponte declared a mistrial, only to have a subsequent prosecution dismissed on double jeopardy grounds. *See State v. Ambrose*, 598 P.2d 354 (Utah 1979),

overruled on other grounds by State v. Harris, 2004 UT 103, 104 P.3d 1250; *West Valley City v. Patten*, 1999 UT App 149, 981 P.2d 420.

Furthermore, even if in some circumstances a trial court has a duty to sua sponte declare a mistrial, such circumstances did not exist in this case. Before sua sponte declaring a mistrial, a trial court must determine that a "manifest necessity for declaring a mistrial exists." *Patten*, 1999 UT App 149, ¶¶ 12-13. The court must also determine that "there are no alternatives to a mistrial." *Id.* at ¶ 13.

Here, there was an alternative. The trial court could have stricken, and in fact did strike, the witness's volunteered statement. The jury was instructed that where "an objection is sustained the evidence is not admitted and you should not consider it." R46 (uppercase omitted).

Jurors are presumed to obey instructions. *See State v. Harmon*, 956 P.2d 262, 273 (Utah 1998) (adopting the standard set forth in *Greer v. Miller*, 483 U.S. 756, 767 n.8 (1987): "[W]e normally presume that a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it, unless there is an 'overwhelming probability' that the jury will be unable to follow the court's instructions, and a strong likelihood that the effect of the evidence would be 'devastating' to the defendant.") (internal quotation marks omitted); *see also State v. Menzies,* 889 P.2d 393, 401 (Utah 1994) ("We generally presume that a jury will follow the instructions given it."); *State v. Devey*, 2006 UT App 219, ¶ 16, 138 P.3d 90 (denying defendant's motion for new trial based on presumption that jurors would follow instruction).

Nothing in this case suggests an "overwhelming probability" that the jury was unable to follow the court's instruction or that mention of the stricken testimony was "devastating" to the defendant. Thus, this Court may presume that the jury followed the trial court's instruction to disregard the stricken testimony volunteered by the witness.

Under the circumstances of this case, the trial not only had no duty to sua sponte declare a mistrial, but, even had defendant moved for a mistrial, could properly have exercised its discretion to deny the motion. Thus, defendant has demonstrated no "manifest necessity for declaring a mistrial."

IX.

BECAUSE DEFENDANT AFFIRMATIVELY APPROVED THE JURY INSTRUCTIONS, HE CANNOT ARGUE THAT THE TRIAL COURT PLAINLY ERRED FOR NOT SUA SPONTE GIVING A LESSER INCLUDED INSTRUCTION ON CRIMINAL TRESPASS

Defendant claims that the trial "court erred in failing to instruct as to the lesser included offense of trespassing." Appellant's Br. at 42. Defendant did not request a lesser included instruction below, and his claim is therefore unpreserved. He has neither alleged nor demonstrated exceptional circumstances or plain error on appeal. This Court should therefore decline to review his claim. *See Pinder*, 2005 UT 15, ¶¶ 50, 58.

In any case, plain error does not lie because defendant invited any error. As explained above, defendant affirmatively approved the jury instructions as given with the exception of Jury Instruction 36, which he asserted was duplicative. Thus, he invited any error in the remaining instructions, and review for plain error does not lie. *Geukgeuzian*, 2004 UT 16, ¶ 9 (citing *Hamilton*, 2003 UT 22, ¶ 54).

X.

BECAUSE DEFENDANT MAKES NO NON-SPECULATIVE ALLEGATION OF FACTS AND PROVIDES NO LEGAL SUPPORT FOR HIS REQUEST THAT THIS COURT RECONSIDER ITS EARLIER DENIAL OF HIS RULE 23B MOTION FOR REMAND, THIS COURT SHOULD DENY IT

Defendant asserts "the necessity of additional testimony concerning the issue of ineffective assistance of counsel" and "submits that [this Court] should reconsider the denial of the Motion to Remand the case for hearing." Appellant's Br. at 44.

After the record was filed in this case, defendant moved for a remand under rule 23B, Utah Rules of Appellate Procedure, to supplement the record with findings necessary to a determination of ineffective assistance of counsel claims. This Court denied the motion, holding that defendant's "motion [wa]s simply too speculative to require a remand" and that it would be "improper to remand a claim under rule 23B for a fishing expedition." Order, dated May 31, 2007 (citation and internal quotation marks omitted).

A remand is available only upon a "nonspeculative allegation of facts, not fully appearing in the record on appeal, which, if true, could support a determination that counsel was ineffective," that is, that defense counsel's performance was deficient and the defendant was prejudiced. Utah R. App P. 23B.

While defendant now asks this Court to reconsider its denial of the motion, he does not provide any nonspeculative allegation of facts, not fully appearing in the record, to support the motion. He does not explain why this Court erred when it denied his original motion. He does nothing more than assert that his appellate brief shows "the

entire context of the matter and the necessity of additional testimony concerning the issue of ineffective assistance." Appellant's Br. at 44.

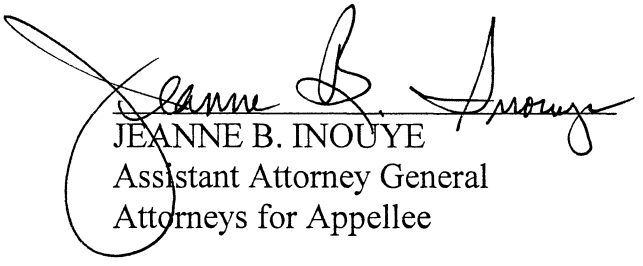
Defendant has not supported his motion for reconsideration.[8] This Court should therefore deny it.

CONCLUSION

Defendant's conviction should be affirmed.

Respectfully submitted this 4th day of October, 2007.

MARK L. SHURTLEFF
Attorney General



JEANNE B. INOUYE
Assistant Attorney General
Attorneys for Appellee

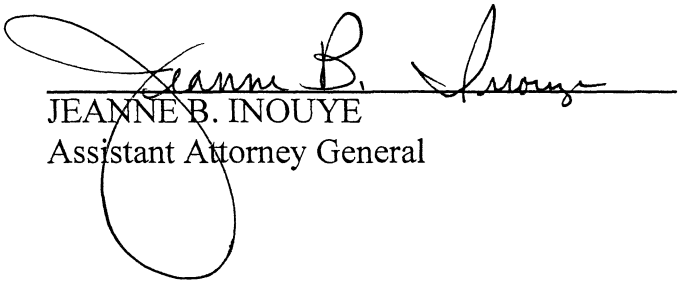
[8] Moreover, defendant has cited no provision of the appellate rules that permits reconsideration of the denial of a Rule 23B motion for remand.

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of October, 2007, I either mailed first-class postage prepaid or hand-delivered two copies of the foregoing Brief of Appellee to appellant's counsel of record, as follows:

RANDALL GAITHER
159 West 300 South, #105
Salt Lake City, UT 84101

Counsel for Appellant



JEANNE B. INOUYE
Assistant Attorney General

Addenda

Addendum A

West 2004

Library References

Corporations ⇐526.
Criminal Law ⇐59 to 82.
Westlaw Key Number Searches: 101k526; 110k59 to 110k82.
C.J.S. Corporations §§ 736 to 739.
C.J.S. Criminal Law §§ 127 to 148, 998 to 999, 1002.

§ 76–2–202. Criminal responsibility for direct commission of offense or for conduct of another

Every person, acting with the mental state required for the commission of an offense who directly commits the offense, who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable as a party for such conduct.

Laws 1973, c. 196, § 76–2–202.

Cross References

Crime victims' reparations, see § 63–25a–402.
Criminal solicitation, elements, see § 76–4–203.
Obstruction of justice, see § 76–8–306.

Law Review and Journal Commentaries

Ball, Case Law Developments: The Expansion of Accomplice Rape to Include Parents Who Orchestrate the Marriage of Their Underage Children to an Adult, 2000 Utah L. Rev. 841 (2000).

Cheney, The Burden of Proof for Imposing Utah's Group Crime Sentence Enhancement, 1998 Utah L. Rev. 611 (1998).

Larson, A Commentary on Physician–Assisted Suicide, 9 Utah B.J. 8 (Jan. 1996).

Library References

Criminal Law ⇐59 to 67.
Westlaw Key Number Searches: 110k59 to 110k67.
C.J.S. Criminal Law §§ 127 to 132, 143, 998 to 999, 1002.

Research References

Encyclopedias

21A Am. Jur.2d Criminal Law § 1227, Particular Acts or Omissions of Counsel as Determinative of Effectiveness of Assistance of Counsel; Generally.

Treatises and Practice Aids

2 Substantive Criminal Law § 13.1, Parties to Crime.

2 Substantive Criminal Law § 13.2, Accomplice Liability-Acts and Mental State.

Wharton's Criminal Law § 38, Accomplices.

United States Supreme Court

Aiding and abetting a felony,

In general,

Aiding and abetting a felony, factual findings, procedure, see Cabana v. Bullock, U.S.Miss.1986, 106 S.Ct. 689, 474 U.S. 376, 88 L.Ed.2d 704, on remand 784 F.2d 187.

Indictment,

Dismissal for failure of indictment to allege intent, reprosecution, see Lee v. U.S., U.S.Ind.1977, 97 S.Ct. 2141, 432 U.S. 23, 53 L Ed.2d 80.

Guilty plea, multiple conspiracy indictments, single conspiracy, see U.S. v. Broce, U.S.Kan.1989, 109 S.Ct. 757, 488 U.S. 563, 102 L.Ed.2d 927.

Variance between indictment and trial proof, right to be tried only on charges in grand jury indictment, see U.S. v. Miller, U.S.Cal.1985, 105 S.Ct. 1811, 471 U.S. 130, 85 L.Ed.2d 99, on remand 762 F.2d 783.

Offenses defined,

West 2004

was obvious from the record that defendant had pleaded guilty to the offense of attempted theft of property from the person of the complaining witness and not to offense of attempted theft, it was not necessary that evidence be presented as to value of property which defendant attempted to steal, and defendant was properly sentenced to an indeterminate term, despite defendant's contention that he had been sentenced for attempted theft and, therefore, maximum sentence could not be in excess of six months because property involved was worth less that $100. U.C.A.1953, 76-1-103(2), 76-3-203(2), 76-6-412, 76-6-412(a)(iv). Henline v. Smith, 1976, 548 P.2d 1271. Larceny ⇦ 88

4. Sex offenses

One to fifteen-year sentence imposed on defendant convicted of rape was proper statutory penalty for offense and sentence would not be reversed and modified since it was not clearly excessive or abuse of trial court's discretion, notwithstanding that, prior to defendant's attempted escape from courtroom, trial judge had stated his intention to defer sentencing until after evaluation period, but rescinded recommendation for evaluation after the escape attempt. U.C.A.1953, 76-3-203, 76-3-404, 76-5-402. State v. Gerrard, 1978, 584 P.2d 885. Rape ⇦ 64

Where, in prosecution for aggravated sexual assault, only matter relied upon by State as an aggravating circumstance was fact that victim was under 14 years of age, and, at time of offense, rape statute provided that male commits rape when he has sexual intercourse with female, not his wife, without her consent and that rape is a felony of second degree and another statute provided that an act of sexual intercourse is without consent when victim is under 14 years of age, defendant should have been sentenced pursuant to statute relating to second-degree felony, one to 15 years, rather than pursuant to statute relating to first-degree felony, five years to life, since there were two statutes which prohibited same conduct but imposed different penalties. U.C.A.1953, 76-3-203(1, 2), 76-5-402, 76-5-405, 76-5-406; U.C.A.1953, 76-5-405(1)(b), Laws 1973, c. 196. State v. Loveless, 1978, 581 P.2d 575. Rape ⇦ 64

Where new penal code was enacted after defendant perpetrated sodomy but before he was sentenced, defendant could not complain because he was sentenced under new code where sentence received was lesser than that which would have been warranted under old law. U.C.A.1953, 76-1-103, 76-3-203(2), 76-3-204(2), 76-5-403(1-3), 76-53-22. State v. Atkinson, 1975, 532 P.2d 215. Criminal Law ⇦ 1165(3)

5. Review

State was not precluded from raising for first time on appeal issue whether trial court imposed illegal sentence upon revocation of probation; under Rules of Criminal Procedure court may correct illegal sentence at any time. U.C.A.1953, 76-3-203(2); Rules Crim.Proc., Rule 22(e). State v. Peterson, 1994, 869 P.2d 989. Criminal Law ⇦ 1042

Defendant who was charged and convicted of aggravated burglary but whose motion to enter judgment of conviction for next lower category of offense was granted by court resulting in him being convicted of attempted aggravated battery and sentenced to statutory penalty for attempted aggravated burglary was not entitled on appeal to attack constitutionality of punishment for aggravated burglary. U.C.A.1953, 76-3-203(1, 2), 76-3-402(1), 76-4-102(2), 76-6-203(1)(c). State v. Harding, 1978, 576 P.2d 1284. Criminal Law ⇦ 1136

§ 76-3-203.1. Offenses committed in concert with two or more persons—Notice—Enhanced penalties

(1)(a) A person who commits any offense listed in Subsection (4) is subject to an enhanced penalty for the offense as provided in Subsection (3) if the trier of fact finds beyond a reasonable doubt that the person acted in concert with two or more persons.

(b) "In concert with two or more persons" as used in this section means the defendant was aided or encouraged by at least two other persons in committing the offense and was aware that he was so aided or encouraged, and each of the other persons:

(i) was physically present; or

(ii) participated as a party to any offense listed in Subsection (4).

(c) For purposes of Subsection (1)(b)(ii):

(i) other persons participating as parties need not have the intent to engage in the same offense or degree of offense as the defendant; and

(ii) a minor is a party if the minor's actions would cause him to be a party if he were an adult.

(2) The prosecuting attorney, or grand jury if an indictment is returned, shall cause to be subscribed upon the information or indictment notice that the defendant is subject to the enhanced penalties provided under this section.

(3) The enhanced penalty for a:

(a) class B misdemeanor is a class A misdemeanor;

(b) class A misdemeanor is a third degree felony;

(c) third degree felony is a second degree felony;

(d) second degree felony is a first degree felony; and

(e) first degree felony is an indeterminate prison term of not less than nine years and which may be for life.

(4) Offenses referred to in Subsection (1) are:

(a) any criminal violation of Title 58, Chapter 37, 37a, 37b, or 37c, regarding drug-related offenses;

(b) assault and related offenses under Title 76, Chapter 5, Part 1;

(c) any criminal homicide offense under Title 76, Chapter 5, Part 2;

(d) kidnapping and related offenses under Title 76, Chapter 5, Part 3;

(e) any felony sexual offense under Title 76, Chapter 5, Part 4;

(f) sexual exploitation of a minor as defined in Section 76-5a-3;

(g) any property destruction offense under Title 76, Chapter 6, Part 1;

(h) burglary, criminal trespass, and related offenses under Title 76, Chapter 6, Part 2;

(i) robbery and aggravated robbery under Title 76, Chapter 6, Part 3;

(j) theft and related offenses under Title 76, Chapter 6, Part 4;

(k) any fraud offense under Title 76, Chapter 6, Part 5, except Sections 76-6-503, 76-6-504, 76-6-505, 76-6-507, 76-6-508, 76-6-509, 76-6-510, 76-6-511, 76-6-512, 76-6-513, 76-6-514, 76-6-516, 76-6-517, 76-6-518, and 76-6-520;

(*l*) any offense of obstructing government operations under Title 76, Chapter 8, Part 3, except Sections 76-8-302, 76-8-303, 76-8-304, 76-8-307, 76-8-308, and 76-8-312;

(m) tampering with a witness or other violation of Section 76-8-508;

(n) extortion or bribery to dismiss criminal proceeding as defined in Section 76-8-509;

(*o*) any explosives offense under Title 76, Chapter 10, Part 3;

(p) any weapons offense under Title 76, Chapter 10, Part 5;

(q) pornographic and harmful materials and performances offenses under Title 76, Chapter 10, Part 12;

(r) prostitution and related offenses under Title 76, Chapter 10, Part 13;

(s) any violation of Title 76, Chapter 10, Part 15, Bus Passenger Safety Act;

(t) any violation of Title 76, Chapter 10, Part 16, Pattern of Unlawful Activity Act;

(u) communications fraud as defined in Section 76-10-1801;

(v) any violation of Title 76, Chapter 10, Part 19, Money Laundering and Currency Transaction Reporting Act; and

(w) burglary of a research facility as defined in Section 76-10-2002.

(5) It is not a bar to imposing the enhanced penalties under this section that the persons with whom the actor is alleged to have acted in concert are not identified, apprehended, charged, or convicted, or that any of those persons are charged with or convicted of a different or lesser offense.

Laws 1990, c 207, § 1; Laws 1994, c. 12, § 108; Laws 1999, c. 11, § 1, eff. May 3, 1999; Laws 2000, c 214, § 2, eff March 14, 2000; Laws 2001, c 209, § 2, eff April 30, 2001.

Cross References

Juveniles, considerations in certification hearings, see § 78-3a-603

Law Review and Journal Commentaries

Cheney, Case Law Developments The Burden of Proof for Imposing Utah's Group Crime Sentence Enhancement, 1998 Utah L Rev 611 (1998)

Dymek, Case Law Developments Utah's Gang Enhancement Statute Found Unconstitutional in Part, 1999 Utah L Rev 1027 (1999)

Smith, Utah's Gang Enhancement Statute Did the Legislature Create a Sentencing Factor As It Intended or Did It Unwittingly Create an Element of the Offense?, 2000 Utah L Rev 671 (2000)

Library References

Sentencing and Punishment ⇨89
Westlaw Key Number Search 350Hk89

C J S Criminal Law §§ 1400, 1465, 1472, 1479, 1492, 1526, 1530

Notes of Decisions

1. In general

Trial court acted in accordance with requirements of sentencing statutes in sentencing defendant to single, enhanced minimum sentences for aggravated burglary and aggravated robbery once gang enhancement was found appropriate, court was not required to impose sentence first on underlying charge and then on gang enhancement U C A 1953, 76-3-203 1(3)(e) (1999) State v Helmick, 2000, 9 P 3d 164, 402 Utah Adv Rep 27, 2000 UT 70 Sentencing And Punishment ⇨ 1050

Under "gang enhancement" statute, state is required to prove that all three actors (1) possessed a mental state sufficient to commit the same underlying offense, and (2) directly committed the underlying offense or solicited, requested, commanded, encouraged, or intentionally aided one of the other two actors to engage in conduct constituting the underlying offense U C A 1953, 76-3-203 1(1)(a, b) State v Lopes, 1999, 980 P 2d 191 365 Utah Adv Rep 17, 1999 UT 24 rehearing denied Sentencing And Punishment ⇨ 94

2. Construction and application

For purposes of gang crime enhancement statute, "in concert" means that the other individuals who participated with defendant would be criminally liable for the offense as accomplices under accomplice liability statute U C A 1953, 76-2-202, 76-3-203 1(1)(b) State ex rel V T , 2000, 5 P 3d 1234, 398 Utah Adv Rep 10, 2000 UT App 189 Criminal Law ⇨ 89

992, 525 Utah Adv. Rep. 9, 2005 UT App 200. Sentencing And Punishment ⇐ 114

Appellate court will reverse a sentence only if it determines that a sentencing court has exceeded its permitted range of discretion, or, stated differently, if it determines that the trial court failed to consider all legally relevant factors, or imposed a sentence that exceeds legally prescribed limits; moreover, its decision is informed by the understanding that the exercise of discretion in sentencing necessarily reflects the personal judgment of the trial court and appellate court can properly find abuse only if it can be said that no reasonable person would take the view adopted by the trial court. State v. Moreno, 2005, 113 P.3d 992, 525 Utah Adv. Rep. 9, 2005 UT App 200. Criminal Law ⇐ 1147

§ 76-3-203.1. Offenses committed in concert with two or more persons—Notice—Enhanced penalties

(1)(a) A person who commits any offense listed in Subsection (4) is subject to an enhanced penalty for the offense as provided in Subsection (3) if the trier of fact finds beyond a reasonable doubt that the person acted in concert with two or more persons.

(b) "In concert with two or more persons" as used in this section means the defendant was aided or encouraged by at least two other persons in committing the offense and was aware that he was so aided or encouraged, and each of the other persons:

(i) was physically present; or

(ii) participated as a party to any offense listed in Subsection (4).

(c) For purposes of Subsection (1)(b)(ii):

(i) other persons participating as parties need not have the intent to engage in the same offense or degree of offense as the defendant; and

(ii) a minor is a party if the minor's actions would cause him to be a party if he were an adult.

(2) The prosecuting attorney, or grand jury if an indictment is returned, shall cause to be subscribed upon the information or indictment notice that the defendant is subject to the enhanced penalties provided under this section.

(3) The enhanced penalty for a:

(a) class B misdemeanor is a class A misdemeanor;

(b) class A misdemeanor is a third degree felony;

(c) third degree felony is a second degree felony;

(d) second degree felony is a first degree felony; and

(e) first degree felony is an indeterminate prison term of not less than nine years and which may be for life.

(4) Offenses referred to in Subsection (1) are:

(a) any criminal violation of Title 58, Chapter 37, 37a, 37b, or 37c, regarding drug-related offenses;

(b) assault and related offenses under Title 76, Chapter 5, Part 1;

(c) any criminal homicide offense under Title 76, Chapter 5, Part 2;

(d) kidnapping and related offenses under Title 76, Chapter 5, Part 3;

(e) any felony sexual offense under Title 76, Chapter 5, Part 4;

(f) sexual exploitation of a minor as defined in Section 76-5a-3;

(g) any property destruction offense under Title 76, Chapter 6, Part 1;

(h) burglary, criminal trespass, and related offenses under Title 76, Chapter 6, Part 2;

(i) robbery and aggravated robbery under Title 76, Chapter 6, Part 3;

(j) theft and related offenses under Title 76, Chapter 6, Part 4;

(k) any fraud offense under Title 76, Chapter 6, Part 5, except Sections 76-6-504, 76-6-505, 76-6-507, 76-6-508, 76-6-509, 76-6-510, 76-6-511, 76-6-512, 76-6-513, 76-6-514, 76-6-516, 76-6-517, 76-6-518, and 76-6-520;

(*l*) any offense of obstructing government operations under Title 76, Chapter 8, Part 3, except Sections 76-8-302, 76-8-303, 76-8-304, 76-8-307, 76-8-308, and 76-8-312;

(m) tampering with a witness or other violation of Section 76-8-508;

(n) extortion or bribery to dismiss criminal proceeding as defined in Section 76-8-509;

(*o*) any explosives offense under Title 76, Chapter 10, Part 3;

(p) any weapons offense under Title 76, Chapter 10, Part 5;

(q) pornographic and harmful materials and performances offenses under Title 7(Chapter 10, Part 12;

(r) prostitution and related offenses under Title 76, Chapter 10, Part 13;

(s) any violation of Title 76, Chapter 10, Part 15, Bus Passenger Safety Act;

(t) any violation of Title 76, Chapter 10, Part 16, Pattern of Unlawful Activity Act;

(u) communications fraud as defined in Section 76–10–1801;

(v) any violation of Title 76, Chapter 10, Part 19, Money Laundering and Currency Transaction Reporting Act; and

(w) burglary of a research facility as defined in Section 76–10–2002.

(5) It is not a bar to imposing the enhanced penalties under this section that the persons with whom the actor is alleged to have acted in concert are not identified, apprehended, charged, or convicted, or that any of those persons are charged with or convicted of a different or lesser offense.

Laws 1990, c. 207, § 1; Laws 1994, c. 12, § 108; Laws 1999, c. 11, § 1, eff. May 3, 1999; Laws 2000, c. 214, § 2, eff. March 14, 2000; Laws 2001, c. 209, § 2, eff. April 30, 2001; Laws 2005, c. 93, § 9, eff. May 2, 2005.

Historical and Statutory Notes

Laws 2005, c. 93 deleted "76–6–503" preceding "76–6–504" in subsec. (4)(k).

United States Supreme Court

Multiple offenses,

In general,

Conspiracy, money laundering, proof of overt act, venue provision allowing prosecution where an act took place, see Whitfield v. U.S., 2005, 125 S.Ct. 687.

Notes of Decisions

5. Guilty pleas

Defendant could be sentenced under gang enhancement statute, pursuant to his negotiated guilty plea to the felony offense of committing aggravated assault in concert with two or more persons, without any requirement that the State establish each element of the gang enhancement statute beyond a reasonable doubt either at a trial at which the State would prove the criminal liability of the others involved in the incident, or through guilty pleas to identical crimes by the others involved in the incident, where defendant's guilty plea admitted every element of both the underlying crime and the gang enhancement. Moench v. State, 2004, 88 P.3d 353, 495 Utah Adv. Rep. 11, 2004 UT App 57. Sentencing And Punishment ⇦ 415

11. Review

Trial court lacked statutory authority to reduce by two degrees, without State's consent, first degree aggravated robbery with gang enhancement to second degree offense without enhancement. State v. Barrett, 2005, 127 P.3d 682, 540 Utah Adv. Rep. 9, 2005 UT 88. Criminal Law ⇦ 977(1)

In order to be eligible for extraordinary relief, State was not required to show that trial court committed gross and flagrant abuse of discretion by allegedly misapplying law governing reduction of offense when it reduced by two degrees charges for first degree felony with gang enhancement to second degree felony without enhancement without prosecutorial consent; rather, State was required to show only abuse of discretion, with egregiousness of error as merely one of several factors for Supreme Court to consider in granting relief; abrogating in *State v. Stirba*, 972 P.2d 918 and *Utah County v. Alexanderson*, 71 P.3d 621. State v. Barrett, 2005, 127 P.3d 682, 540 Utah Adv. Rep. 9, 2005 UT 88. Courts ⇦ 207.1

§ 76–3–203.3. Penalty for hate crimes—Civil rights violation

As used in this section:

(1) "Primary offense" means those offenses provided in Subsection (4).

(2)(a) A person who commits any primary offense with the intent to intimidate or terrorize another person or with reason to believe that his action would intimidate or terrorize that person is subject to Subsection (2)(b).

(b)(i) A class C misdemeanor primary offense is a class B misdemeanor; and

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Diagnostic evaluation which indicated that defendant was being considered for substance abuse program but was not serious about changing his behavior, together with defendant's criminal record, provided sufficient basis for sentencing defendant to statutorily prescribed period for burglary rather than placing him in substance abuse program. State v. Sweat, 1986, 722 P.2d 746. Sentencing And Punishment ⇐ 323

Trial court, in prosecution of defendant for burglary, did not abuse its discretion in not placing defendant on probation. U.C.A.1953, 76–6–202. State v. McClendon, 1980, 611 P.2d 728. Sentencing And Punishment ⇐ 1844

18. Review

Burglary defendant, by requesting court-appointed counsel, waived right to claim that counsel was ineffective when she did not raise, either at trial or on appeal, contention that defendant was deprived of his right to self-representation, as defendant's request for counsel went beyond mere acquiescence and simple cooperation. U.S.C.A. Const.Amend. 6; U.C.A. 1953, 76–6–202(1). Rudolph v. Galetka, 2002, 43 P.3d 467, 439 Utah Adv. Rep. 8, 2002 UT 7. Criminal Law ⇐ 1137(8)

There was no reasonable likelihood that outcome of trial in which defendant was convicted of third-degree felony burglary would have been different absent prosecutor's improper references to alleged prior convictions of defendant other than three prior burglary felony convictions to which he admitted, so as to justify reversal, where evidence of guilt was not marginal and court instructed that fact witness had been convicted of felony should be considered only in judging credibility of testimony but did not raise presumption that witness testified falsely, that statements of counsel were not evidence to be considered, and that facts were to be determined from evidence, not from speculation or conjecture. U.C.A.1953, 76–6–202. State v. Peterson, 1986, 722 P.2d 768. Criminal Law ⇐ 1171.8(2)

It would not be assumed that trial court, in nonjury prosecution for burglary and robbery, by not mentioning possible defense of diminished mental capacity, had not considered such defense. U.C.A. 1953, 76–6–202, 76–6–301. State v. Romero, 1984, 684 P.2d 643. Criminal Law ⇐ 260.11(2)

In burglary prosecution, inference could be drawn by jury from defendant's unauthorized entry into darkened apartment by forcible means through bedroom window during late evening hours that defendant did so with an intent to commit theft, and thus trial court did not err in denying defendant's motion to reduce charge of burglary to criminal trespass and submitting issue to the jury. U.C.A.1953, 76–6–201(3), 76–6–202(1). State v. Brooks, 1981, 631 P.2d 878. Burglary ⇐ 29

Defendant accused of burglary and larceny could not complain that no one asked him to explain his possession of recently stolen property. U.C.A.1953, 76–38–1. State v. Martinez, 1968, 21 Utah 2d 187, 442 P.2d 943. Burglary ⇐ 42(4); Larceny ⇐ 64(6)

Record on appeal from burglary conviction failed to support defendant's claims of error in admitting victim's testimony as to identification of stolen items, as going to ultimate fact in issue, in refusing to give instruction as to recently stolen property, or in denying defendant probation. State v. Brown, 1967, 19 Utah 2d 5, 425 P.2d 405. Burglary ⇐ 34; Burglary ⇐ 46(7); Sentencing And Punishment ⇐ 1890

19. Post-conviction relief

Postconviction relief petitioner was procedurally barred from contending that burglary statute was unconstitutionally vague and that he was denied the right of self-representation, as the issues were raised for the first time in the petition and he did not demonstrate an obvious injustice or a substantial and prejudicial denial of a constitutional right. U.C.A.1953, 76–6–202(1). Rudolph v. Galetka, 2002, 43 P.3d 467, 439 Utah Adv. Rep. 8, 2002 UT 7. Criminal Law ⇐ 1429(1)

Postconviction relief petitioner waived claim that counsel was ineffective by failing to challenge burglary statute on vagueness grounds; since petitioner filed his own briefs on direct appeal, he could and should have raised the issue himself at that time. U.S.C.A. Const. Amend. 6; U.C.A.1953, 76–6–202(1). Rudolph v. Galetka, 2002, 43 P.3d 467, 439 Utah Adv. Rep. 8, 2002 UT 7. Criminal Law ⇐ 1430

Under the Post–Conviction Relief Act, a petitioner may raise the issues he failed to raise on direct appeal through an allegation of ineffective assistance of counsel at trial and on appeal if he was represented by the same counsel during both phases of the criminal proceedings, as it is unreasonable in such circumstances to expect counsel to raise on direct appeal the issue of his own ineffectiveness at trial. U.S.C.A. Const.Amend. 6; U.C.A.1953, 76–6–202(1). Rudolph v. Galetka, 2002, 43 P.3d 467, 439 Utah Adv. Rep. 8, 2002 UT 7. Criminal Law ⇐ 1440(3)

§ 76–6–203. Aggravated burglary

(1) A person is guilty of aggravated burglary if in attempting, committing, or fleeing from a burglary the actor or another participant in the crime:

(a) causes bodily injury to any person who is not a participant in the crime;

(b) uses or threatens the immediate use of a dangerous weapon against any person who is not a participant in the crime; or

(c) possesses or attempts to use any explosive or dangerous weapon.

(2) Aggravated burglary is a first degree felony.

(3) As used in this section, "dangerous weapon" has the same definition as under Section 76-1-601.

Laws 1973, c. 196, § 76-6-203; Laws 1988, c. 174, § 1; Laws 1989, c. 170, § 6.

Cross References

Attempt, elements and classification, see §§ 76-4-101 and 76-4-102.
Body armor, increase of sentence if worn in violent felony, see § 76-3-203.7.
Conspiracy and solicitation, elements and penalties, see § 76-4-201 et seq.
Enhanced penalty, certain offenses committed by prisoner, see § 76-3-203.6.
Fines upon conviction of misdemeanor or felony, see § 76-3-301.
Habitual violent offenders, definition and penalties, see § 76-3-203.5.
Inchoate offenses, limitations on sentencing, see §§ 76-4-301 and 76-4-302.
Indigent Defense Act, see § 77-32-101 et seq.
Penalties for felonies, see § 76-3-203.
Rights of Crime Victims Act, see § 77-38-1 et seq.
Right to trial by jury, see Const. Art. 1, § 10.
Serious youth offenders, charging procedure, see § 78-3a-602.

Library References

Burglary ⇐2 to 10.
Westlaw Key Number Searches: 67k2 to 67k10.
C.J.S. Burglary §§ 2 to 6, 11 to 22, 26 to 42.

Research References

Treatises and Practice Aids

1 Criminal Law Defenses § 110, Property Intrusion and Destruction Offenses-Miscellaneous Defenses.
3 Substantive Criminal Law § 21.1, Burglary.
Trial Handbook for Utah Lawyers § 7:32, Attempted burglary, burden of proof.
Wharton's Criminal Law § 331, In General.

Notes of Decisions

1. Double jeopardy

Defendant's convictions for aggravated burglary and aggravated robbery arising from same conduct did not constitute impermissible multiple punishment and did not violate double jeopardy clause; charge of aggravated burglary required proof that defendant entered or remained in building, and aggravated robbery required proof that defendant took another's property. U.S.C.A. Const.Amend. 5; Const. Art. 1, § 12; U.C.A.1953, 76-1-402(3), 76-6-203, 76-6-302. State v. Brooks, 1995, 908 P.2d 856. Double Jeopardy ⇐ 145

2. Consent

Consent manifested by victim when he opened door to defendant, who he believed had come to his house for lawful purpose, was limited to that purpose and did not, in context of charge of aggravated burglary, authorize defendant to order victim out of house at gunpoint. U.C.A.1953, 76-6-202. State v. Bradley, 1985, 752 P.2d 874. Burglary ⇐ 15

3. Elements of offense

Unlawful entry or remaining in building is not a necessary element of aggravated burglary con-

Addendum B

INSTRUCTION NO. 26

To convict the defendant on Count 1, **AGGRAVATED BURGLARY** you must believe from all of the evidence and beyond a reasonable doubt each of the following elements:

1. That on or about January 1, 2006,
2. in the State of Utah,
3. the defendant, as a party to the offense,
4. entered or remained unlawfully
5. in a building or any portion of a building
6. with the intent to commit a felony, theft, or an assault on any person,
7. and in the course of attempting, committing, or fleeing,
8. the defendant or another participant in the crime:
   (a) caused bodily injury to any person who was not a participant in the crime,
   (b) used or threatened the immediate use of a dangerous weapon against any person who was not a participant in the crime; or
   (c) possessed or attempted to use a dangerous weapon.

If you find from all the evidence that each and every element of **AGGRAVATED BURGLARY**, as explained in this instruction has been proven beyond a reasonable doubt, you must find the defendant guilty of this offense. However, if you find that one or more of the above elements have not been proven beyond a reasonable doubt, you must find the defendant not guilty.

INSTRUCTION NO. 33

In the event you find the defendant guilty on any of Counts 1 through 7, you will be asked to determine whether defendant committed any of those counts "in concert with two or more persons," which is defined below. If you find, from all the evidence and beyond a reasonable doubt, that the defendant acted in concert with two or more persons, you will please make that finding on the verdict form where indicated. If you are not convinced beyond a reasonable doubt that the defendant acted in concert with two or more persons, you will please make that finding on the verdict form where indicated.

INSTRUCTION NO. 34

DEFINITIONS

1. "ASSAULT" 76-5-102(1) means:

(a) an attempt, with unlawful force or violence, to do bodily injury to another;

(b) a threat, accompanied by a show of immediate force or violence, to do bodily injury to another; or

(c) an act, committed with unlawful force or violence, that causes bodily injury to another or creates a substantial risk of bodily injury to another.

2. "BODILY INJURY" 76-1-601(3) means:
physical pain, illness, or any impairment of physical condition.

3. "BUILDING," in addition to its ordinary meaning, means:
Any watercraft, aircraft, trailer, sleeping car, or other structure or vehicle adapted for overnight accommodation of persons or for carrying on business therein and includes:
(a) each separately secured or occupied portion of the structure or vehicle; and
(b) each structure appurtenant to or connected with the structure or vehicle.

4. "CHILD" 76-5-109(1)(a) means:

a human being who is under 18 years of age.

5. "DANGEROUS WEAPON" 76-1-601(5) means:

(a) any item capable of causing death or serious bodily injury; or

(b) a facsimile or representation of the item; and:

(i) the actor's use or apparent intended use of the item leads the victim to reasonable believe the item is likely to cause death or serious bodily injury; or

(ii) the actor represents to the victim verbally or in any other manner that he is in control of such an item.

6. A person "ENTERS OR REMAINS UNLAWFULLY" in or upon premises when the premises or any portion thereof at the time of the entry or remaining are not open to the public and when the actor is not otherwise licensed or privileged to enter or remain on the premises or such portion thereof.

7. "ENTER" means:
(a) intrusion of any part of the body; or
(b) intrusion of any physical object under control of the actor

8. "IN CONCERT WITH TWO OR MORE PERSONS" 76-3-203.1(b) and (4)(b) means: the defendant was aided or encouraged by at least two other persons in committing the offense and was aware that he was so aided or encouraged, and each of the other persons:
(a) was physically present; or
(b) participated as a party to any offense in
(i) assault and related offenses under Title 76, Chapter 5, Part 1, or
(ii) burglary and related offenses under Title 76, Chapter 6, Part 2.
Other persons participating as parties need not have the intent to engage in the same offense or degree of offense as the defendant. And it is not necessary that the persons with whom the actor is alleged to have acted in concert are not identified, apprehended, charged, or convicted, or that any of those persons are charged with or convicted of a different or lesser offense.

6. "INTENTIONALLY" 76-2-103(1) means:

Intentionally, or with intent or willfully with respect to the nature of his conduct or to a result of his conduct, when it is his conscious objective or desire to engage in the conduct or cause the result.

7. "KNOWINGLY" 76-2-103-(2) means:

Knowingly, or with knowledge, with respect to his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or the existing circumstances. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

8. "PARTY TO THE OFFENSE": 76-2-202 means:

Every person, acting with the mental state required for the commission of an offense who directly commits the offense, who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable as a party for such conduct.

9. "PHYSICAL INJURY" 76-5-109(1)(c) means:

any injury to or condition of a child which impairs the physical condition of the child, including:

(i) a bruise or other ~~conduction~~ contusion of the skin;

(ii) a minor laceration or abrasion; or

(iii) any other condition which imperils the child's health or welfare and which is not a serious physical injury.

10. "SERIOUS PHYSICAL INJURY" 76-5-109(1)(d) means:

any physical injury or set of injuries that:

(A) seriously impairs the child's health;

(B) involves physical torture;

(C) causes serious emotional harm to the child; or

(D) involves a substantial risk of death to the child, including:

(i) any injury caused by use of a dangerous weapon, or

(ii) any combination of two or more physical injuries inflicted by the same person, either at the same time or on difference occasions.

INSTRUCTION NO. 35

In any prosecution in which an actor's criminal responsibility is based on the conduct of another, it is no defense that the person for whose conduct the actor is criminally responsible has been acquitted, has not been prosecuted or convicted, has been convicted of a different offense or of a different type or class of offense or is immune from prosecution.